



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**  
**CIVIL APPEAL NO. 71 OF 2008**

**1. PIUS MAWEU MUSIU**

**2. JOSEPH MUTUNGA NTHENGE.....APPELLANTS**

**VERSUS**

**TITUS MUSYOKA MUUNGAMI.....RESPONDENT**

*(Being an appeal from the Judgment of the Principal Magistrate's Court at Kitui*

*of Hon M.O. Kizito (R.M) Civil Case No. 327 of 2000 dated 13<sup>th</sup> March 2008)*

\*\*\*\*\*

*(Before B. Thurania Jaden J)*

**J U D G E M E N T**

1. In the suit before the lower court, the Appellant, **Pius Maweu Musiu** and **Joseph Mutunga Nthenge** had sued the Respondent **Titus Musyoka** for General Damages for breach of contract. Briefly stated, the Appellants' case was that they had entered into a sale agreement for purchase of a parcel of land No. **1054 Musukini Adjudication Section** at an agreed purchase price of Kshs.27,000/=. The Appellants claimed that they made a down payment of Kshs.7,000/= to the Respondent but the Respondent breached the agreement and failed to collect the balance of the purchase price and sold the land to somebody else and refunded to the Appellants the Kshs.7,000/= down payment.

2. The claim was denied by the Respondent who blamed the Appellants for failure to pay the balance of the purchase price.

3. When the case proceeded to hearing before the lower court, the Appellants gave evidence which establishes that they entered into a written sale agreement on 8/12/1997 at a purchase price of Kshs.27,000/=. That the Respondent paid Kshs.7,000/= and was to pay the balance of Kshs. 20,000/= in three installments with effect from end of January 1998. The Appellants who described themselves as agricultural officers in **Mutitu Division** of **Kitui** at the material time further testified that the Respondent did not collect the 1<sup>st</sup> installment at the end of January 1998 or at all but in the month of September 1999 refunded the Kshs.7,000/= deposit through their advocate and sold the same parcel of land to somebody else. The Appellants were aggrieved by what they saw as a breach of contract by the Respondent and filed suit.

4. The Respondent in his evidence referred to the same sale agreement. He described himself as a businessman who lived in **Nairobi** at the time of the agreement. The Respondent's position was that he sent one **Christopher Ndunda** on 19/1/1998 with a letter requesting the Appellants to pay the balance of the purchase price and to give the said **Christopher Ndunda** the agreement for the Respondent to acknowledge the payments of the purchase price therein but the Appellants failed to pay any money. Later the Respondent's son passed away and he demanded for the balance of the purchase price from the 2<sup>nd</sup> Appellant. That the 2<sup>nd</sup> Appellant said he would inform the 1<sup>st</sup> Appellant but nothing was forthcoming. After another failed attempt to get the balance paid by the Appellants through the Respondent's brother, the Respondent sold the land to another buyer. The Respondent blamed the Appellants for the breach of the contract. That later the Respondent received a demand letter demanding Kshs.10,200/= from the Appellants Advocate but refunded the Kshs.7,000/= which he had received.

5. **Christopher Ndunda Nzavili (DW2)** in his evidence confirmed having been sent with a letter by the Respondent to collect the balance of the purchase price. That he gave the 2<sup>nd</sup> Appellant the letter but no money was paid.

6. At the conclusion of the trial, the trial magistrate dismissed the Appellants' suit with costs.

7. The Appellants were aggrieved by the said judgment and appealed to this court on the following grounds:-

**1. "The learned Senior Resident Magistrate erred and misdirected himself both in law and facts when he held that the Respondent was not in breach of contract of sale when the evidence on record overwhelmingly pointed out that he was in such breach.**

**2. The learned Senior Resident Magistrate erred and misdirected himself when he failed to find that the Respondent had no reasons nor sufficient reasons to repudiate the sale contract and that the Respondent deliberately induced non completion of the sale contract by refusing to collect the balance of the purchase price thence rendering him liable for breach of sale contract.**

**3. The decision of the learned Senior Resident Magistrate was against the weight of the evidence."**

8. This being a first appeal, the court is duty bound to re-evaluate the evidence on record and come to its own findings.

9. It is not in dispute that the parties herein entered into a sale agreement. The said translated version of the sale agreement read as follows:-

**"BUYING AND SELLING OF LAND**

**SELLER:** TITUS M. MUUNGAMI

**BUYER:** MUTUNGA NTHENGE AND MAWEU MUSIU

**Today, 8/12/1997 I Titus M. Muungami have sold to Mutunga Nthenge and Maweu Musiu my parcel of land, besides Mwingi Road. To the North the same goes up to the stream, bordering with Kithome Mutinda, where lies the same grave of his late father, Muungami Kilwenge.**

**The agreed purchase price is Kshs.27,000/= (Kenya Shillings Twenty Seven Thousand Only) and to date the buyers have made a down payment of Kshs.7,000/= (Kenya Shillings Seven Thousand) leaving a balance of Kshs.20,000/= (Twenty Thousand Only).**

**The remaining balance shall be paid in three installments starting from end of January**

1998.”

10. All the three grounds of appeal can be collapsed into one ground that is who was in breach of the sale agreement. I have reproduced the contents of the sale agreement. The agreement was vague on how the remaining balance was to be paid to them. It failed to state the following:-

- **When were the other installments to be paid? Was it at the end of each succeeding month?**
- **Where was the payment to take place?**
- **Was the payment to be made to the 1<sup>st</sup> Appellant, to the 2<sup>nd</sup> Appellant or to who?**
- **What was to happen in the event of default?**

11. The Appellants in their evidence blame the Respondent for not going to them to collect the balance of the purchase price. The Respondent on the other hand states that he sent one **Christopher Ndunda Nzavili** to collect the balance and thereafter sent his brother to collect the same but there was no payment hence his having sold the land to somebody else. The oral evidence by both the Appellants and by the Respondent on how the balance was to be paid is not supported by the contents of their own written agreement. The written agreement is ambiguous on how the balance was to be paid. The court cannot rewrite the agreement for the parties. I can only say that the parties do not seem to have reached a consensus on how the balance was to be paid. Consequently, I agree with the lower court’s judgment that the Appellants failed to prove their case on a balance of probabilities. The appeal has no merits and I dismiss the same with costs.

.....

**B. THURANIRA JADEN**

**JUDGE**

Dated and delivered at **Kitui** this **18<sup>th</sup>** day of **September** 2014.

.....

**B. THURANIRA JADEN**

**JUDGE**